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Supreme Court, U.S.
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No. 96-51

IN THE

Supreme Court Of The United States

October Term, 1995

GUY AND BONNIE L. ADAMS, *et. al.*,
ON THEIR OWN BEHALF AND AS CLASS REPRESENTATIVES
OF ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
AND BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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September 27, 1996

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Pursuant to Supreme Court Rule 15(8), Respondents Burlington Northern Railroad Company (the "Railroad") and Burlington Northern Inc. submit this supplemental brief to address *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), which was decided on August 14, 1996, after Respondents filed their opposition brief, and raised by Petitioners for the first time in their reply brief on September 20, 1996.[1] Petitioners contend that the Eighth Circuit's decision in *Trostel* is in conflict with the Ninth Circuit's decision in this case and that the Eighth Circuit's decision supports their contention that they are entitled to payment of principal and interest in gold on bonds issued almost a century ago. Reply Br. 2-5. The Petitioners are mistaken.

Like the Ninth Circuit in this case (Opp. Br. 8), the Eighth Circuit in *Trostel* correctly identified the relevant statutory framework governing obligations requiring payment in gold:

> "In 1933 Congress passed legislation which affected all gold clauses. A joint resolution of Congress declared gold clauses to be against public policy and provided that 'dollar for dollar' payments in United States currency would discharge any obligation. . . . . Subsequently in 1975 Congress repealed the ban on private ownership of gold, and in 1977 it passed an amendment to the 1933 gold clause statute. The amendment provided that the provisions of the 1933 statute would not apply to obligations issued after October 27, 1977." 92 F.3d at 738 (citations omitted).

The issue before the Eighth Circuit in *Trostel* was whether a gold clause within a 1917 real restate lease was rendered enforceable when the parties to that lease entered a new, 1990

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[1] Because Petitioners served their reply brief by mail, Respondents did not receive that brief until September 25, 1996. Respondents are filing this supplemental brief as expeditiously as possible.

lease agreement—a novation—that incorporated the terms of the 1917 lease. In holding that the 1990 novation of the real estate lease could cause a gold obligation to "issue" within the meaning of the 1977 amendment, the Eighth Circuit followed an earlier Ninth Circuit case, *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990)), *see* 92 F.3d at 741, which was properly distinguished by the court of appeals in this case, *see* Pet. App. 13a. There is simply no conflict between the Circuits.

In this case, the court of appeals refused to enforce gold clauses in bonds issued nearly a century ago under the novation analysis applied in *Fay* and now by the Eighth Circuit in *Trostel* for two reasons. *First*, the court held that the term "issued" as used in the 1977 amendment has a very specific meaning with respect to bonds: "A bond obligation is 'entered into,' or 'issued' when the bond first 'comes into the hands of a holder, so executed and delivered as to bind the obligor'". Pet. App. 11a (citing 6A Fletcher Cyc. Corp. § 2688 (1989)). Accordingly, the court correctly held that cases involving real estate leases, such as *Fay* and *Trostel*, had no application to cases involving bonds, such as this case:

> "Whatever may be the rule regarding transfer of leases, bonds must continue to be viewed as issued on the date of first issue. . . . If either the sale of bonds, or the merger of the obligor with an agreement to honor outstanding bonds, were to effectuate a new issue of the bonds, the prospective nature of the 1977 amendment would be almost entirely defeated in the major area of corporate bonds. It was the intent of the 1977 amendment to remain 'neutral' concerning bonds issued prior to 1977, not to render virtually all of them payable in gold, which would be the effect were Adams' doctrine of novation applied to bond obligations. Moreover, the issuance of corporate

> bonds is subject to a well-developed, specialized body of law, and the general law of novation is not easily injected into that context. Although sometimes described as a specific type of contract, bonds are financial instruments inherently different from leases, which were at issue in the cases that Adams cites. Bonds are regularly sold and purchased in large, impersonal markets, by corporations that frequently undergo corporate changes, while lease holds generally involve a small number of readily ascertainable and stable parties who can engage in the type of bargaining and mutual consent necessary for a novation. . . . We are unable to accept the view that Congress intended to alter so radically the obligations of bonds that have been in public circulation for nearly a century, when the language and history of its amendment suggests a contrary purpose. We conclude that none of the theories of novation advanced by Adams are sufficient to cause us to recede from the view that the Railroad's bonds were 'issued' on the date of first issue, in 1896 or 1921, as the case may be. They consequently are subject to the 1933 statute and may be paid with any legal tender." Pet. App. 13a-14a (citations and footnotes omitted).

The court of appeals' holding that novation analysis does not apply to corporate bonds is consistent with the decisions of every other court that has addressed the issue. *See Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521, 528 n.5 (Cal. Ct. App. 1995); *Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.*, 649 P.2d 947, 950 (Ala. 1982).

Second, the court of appeals held here that "[e]ven if novation analysis were appropriate, the circumstances surrounding the corporate transactions in this case would not meet the formal requirements for a novation". Pet. 14a n.4. As the Eighth Circuit held in *Trostel*, a novation occurs where

the parties enter a new agreement and extinguish the old agreement. 92 F.3d at 740; *see also* Op. Br. 20. In *Trostel*, the parties did not dispute "that the 1990 [real estate lease] transaction was anything other than a novation". 92 F.3d at 741. In contrast, the agreements between the bondholders as a class and the Railroad at issue here "expressly indicated a continuity of the original obligations to the bondholders, the old obligations were never extinguished, and no new obligor was substituted". Pet. App. 14a n.4. Under these agreements, "there was no new bond issuance because the Railroad did not undertake any new debt obligation". *Id.*; *see also* Op. Br. 19-25. Thus, the court of appeals correctly held that the gold bonds were unenforceable even under the novation analysis applied in *Fay* and applied again, and consistently, in *Trostel*.[2]

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[2] The Petitioners frivolously suggest that *Trostel* is in conflict with the court of appeals' holding here that pre-1977 gold clause obligations may be discharged in any legal tender under the 1933 joint resolution as amended in 1977. Reply Br. 2-3. In *Trostel*, the Eighth Circuit correctly held that obligations issued before 1977—such as the gold bonds at issue here—could be discharged in any legal tender, not just gold coin. 92 F.3d at 738, 742. The issue before the court in *Trostel* was whether the 1990 novation of a 1917 real estate lease caused a new obligation to "issue" after 1977, and if so, whether that new obligation contained a gold clause. *Id.* at 740-41. Because the Railroad's gold bonds were issued well before 1977, as shown, there simply is no conflict between *Trostel* and this case.

Conclusion

For the foregoing reasons, the Eighth Circuit's recent decision in *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), is perfectly consistent with Ninth Circuit authority in general and the decision of the court of appeals here in particular. *Trostel* does not make this case worthy of *certiorari*.

Respectfully submitted,

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